



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 23, 2004

Mr. Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
P.O. Box 12927
Austin, Texas 78711-2927

OR2004-3330

Dear Mr. Seidenberg:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 199985.

The Texas State Library and Archives Commission ("TSLAC") received a request for the records of former Texas Governor George W. Bush's records concerning the Texas Air National Guard and Texas Army National Guard. You state that some of the requested information is being released to the requestor. You also indicate that the requestor has agreed to exclude e-mail addresses from his request. You have submitted the remaining requested information to this office for review.

At the request of the Office of the Governor (the "governor"), you raise sections 552.107 and 552.111 of the Government Code for some of the submitted information, but take no position as to whether these exceptions apply to that information. You also ask whether section 552.101 of the Government Code excepts any of the submitted information from disclosure. We have considered the exceptions raised and reviewed the submitted information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Although section 552.107 has been raised, this office has not received arguments from any party establishing the applicability of this exception. *See* Gov't Code §§ 552.301, .302; Open Records Decision Nos. 676 at 6-7 (2002) (when asserting attorney-client privilege, governmental body bears burden of providing necessary facts to

demonstrate elements of privilege), 630 at 4 (1994) (governmental body may waive section 552.107(1)). Therefore, we find that none of the submitted information is excepted from disclosure under section 552.107.

Section 552.111 of the Government excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Evidence. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). This section also excepts from disclosure internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of a governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); Open Records Decision No. 615 (1993). Although section 552.111 has been raised, this office has not received arguments from any party establishing the applicability of this exception. See Gov’t Code §§ 552.301, .302; Open Records Decision Nos. 677 at 6-8 (2002) (when asserting attorney work product privilege, governmental body bears burden of demonstrating that information was created or developed for trial or in anticipation of litigation by or for party or party’s representative), 473 (1987) (statutory predecessor to section 552.111 may be waived). Therefore, we find that none of the submitted information is excepted from disclosure under section 552.111.

You ask whether certain information is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes, such as sections 306.003 and 306.004 of the Government Code. In Open Records Decision No. 648 (1996), we addressed the application of these confidentiality provisions. Sections 306.003 and 306.004 of the Government Code work together to provide a measure of confidentiality for records of communications between citizens and members of the legislature. *Id.* at 1-2. Both statutes grant a member of the legislature the discretion to release information covered by the statutes. *Id.* at 2.

Section 306.003 provides as follows:

- (a) Records of a member of the legislature or the lieutenant governor that are composed exclusively of memoranda of communications with residents of this state and of personal information concerning the person communicating with the member or lieutenant governor are confidential. However, the member or the lieutenant governor may disclose all or a part of a record to which this subsection applies, and that disclosure does not violate the law of this state.

- (b) The method used to store or maintain a record covered by Subsection (a) does not affect the confidentiality of the record.

The confidentiality provision in section 306.003(a) applies to the records of a member of the legislature or of the lieutenant governor consisting of two kinds of information: 1) records of memoranda of communications with Texas residents and 2) records of personal information about the person communicating with the legislator or lieutenant governor. *Id.* Thus, "personal information" about a person communicating with a legislator or the lieutenant governor is within section 306.003(a) even if it is not recorded in a memorandum prepared by the member. *Id.* While section 306.003(a) deems confidential the records subject to the provision, it gives a member of the legislature the discretion to disclose all or part of such record. Gov't Code § 306.003(a).

While section 306.003 applies to records consisting of memoranda of communications and records of a correspondent's personal information, section 306.004 refers to the communications themselves. Section 306.004 provides as follows:

- (a) To ensure the right of the citizens of this state to petition state government, as guaranteed by Article I, Section 27, of the Texas Constitution, by protecting the confidentiality of communications of citizens with a member of the legislature or the lieutenant governor, the public disclosure of all or part of a written or otherwise recorded communication from a citizen of this state received by a member or the lieutenant governor in his official capacity is prohibited unless:

- (1) the citizen expressly or by clear implication authorizes the disclosure;
- (2) the communication is of a type that is expressly authorized by statute to be disclosed; or
- (3) the official determines that the disclosure does not constitute an unwarranted invasion of personal privacy of the communicator or another person.

- (b) This section does not apply to a communication to a member of the legislature or the lieutenant governor from a public official or public employee acting in an official capacity.

- (c) A member or the lieutenant governor may elect to disclose all or part of a communication to which this section applies, and that disclosure does not violate the law of this state.

Gov't Code § 306.004. A "communication" includes "conversation, correspondence, and electronic communication." Gov't Code § 306.001. The communication is not subject to public disclosure unless one of the three conditions stated in section 306.004(a) apply. As with the records within section 306.003(a), a member of the legislature has discretion to disclose all or part of the records subject to section 306.004(a).

You ask whether the information in attachment H is confidential under either section 306.003(a) or 306.004(a). After reviewing attachment H, we find that none of the information in this attachment is within the scope of section 306.003(a) or 306.004(a).

Finally, we consider whether any of the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with the right to privacy. Section 552.101 encompasses the doctrines of common law and constitutional privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open

Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

We agree that certain information within the submitted documents is highly intimate or embarrassing. We note, however, that in this case there is a legitimate public interest in some of that information, and thus not all of the highly intimate or embarrassing information can be withheld from disclosure under section 552.101 in conjunction with the right to privacy. *See* Open Records Decision Nos. 542 at 5 (1990) (information regarding public employee's qualifications is of legitimate concern to public), 470 at 4 (1987) (public employee's job performance does not generally constitute private affairs), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom not protected under statutory predecessor to section 552.101). We have marked the information that must be withheld under section 552.101 in conjunction with privacy. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen Hattaway
Assistant Attorney General
Open Records Division

KEH/sdk

Ref: ID# 199985

Enc. Submitted documents

c: Mr. Nathan Levy
3605 Steck Avenue #2048
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(w/o enclosures)